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No. 88-773

In The

Supreme Court of the United States

October Term, 1988

UNITED ARTISTS THEATRE CIRCUIT, INC., and
AMERICAN MULTI-CINEMA, INC.,
Petitioners,

v.

HARKINS AMUSEMENT ENTERPRISES, INC., and
DANIEL E. HARKINS D/B/A
TOWER PLAZA CINEMA I AND II,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners seek review of a narrow issue determined by the Ninth Circuit Court of Appeals in this motion picture antitrust case on appeal from summary judgments granted by the trial court. The Court of Appeals affirmed in part and reversed in part, remanding for trial Respondents' Section 1 claims of market splitting, bid rigging, and circuit-wide deals *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 480 (9th Cir. 1988).

Harkins is an independent theatre owner in Phoenix, Arizona. His market splitting claim alleges an unlawful cartel formed by his competitors, two of whom are petitioners herein, to divide and allocate among themselves available first-run films released by the motion picture distributors, also named as defendants in the action. [1] Harkins was systematically denied a competitive opportunity to license the distributors' films outside the split. Specifically, petitioners challenge the Court of Appeals'

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[1] Pursuant to Supreme Court Rules 28.1 and 34.1(b), the following are parties to the Ninth Circuit Court of Appeals proceedings and judgment sought to be reviewed: (1) Respondent Harkins Amusement Enterprises, Inc., a closely-held Arizona corporation, wholly owned by Respondent Daniel E. Harkins, who also did business as Tower Plaza Cinema I and II; (2) Petitioners/Exhibitor Defendants United Artists Theatre Circuit, Inc., and American Multi-Cinema, Inc.; (3) Exhibitor Defendant The Harry Nace Company (not a petitioner); and (4) Distributor Defendants Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Universal Film Exchanges, Inc. (Universal City Studios), Warner Brothers Distributing Corporation, Columbia Pictures Industries, Inc., DeLaurentis Entertainment Group (formerly AVCO Embassy Pictures Corporation), and United Artists Corporation. In addition, the following named defendants were dismissed from the case prior to the summary judgment entered below and the appeal to the Ninth Circuit: (5) Exhibitor Defendants General Cinema Corporation, General Cinema of Arizona, Plitt Inter-Mountain Theatres, Inc., and Mann Theatres Corporation of California; and (6) Distributor Defendants Metro-Goldwyn-Mayer, Inc., and Buena Vista Distributing Co.

conclusion that the split, "if proven, is illegal *per se*." 850 F.2d at 486. Apart from a rather insincere attempt to raise a due process argument, petitioners do not challenge any other aspect of the Court of Appeals' decision.

Petitioners generally misstate the record and mislead this Court with regard to both the facts presented to the Court of Appeals and the law applied by the Court in its analysis of those facts. Properly phrased, the questions presented by the petition for certiorari are as follows:

I. In the present posture of this case, upon reversal of summary judgment finding genuine issues of material fact in dispute, should this Court deny the petition as premature?

II. Even if the petition were not premature, did the Court of Appeals correctly analyze the Phoenix exhibitor split as a *per se* group boycott among Harkins' competitors, effectively denying him access to the supply of films he needed in order to compete?

III. Since the *per se* issue was briefed and argued in the trial court and on appeal, can petitioners, without any prior objection, now claim that the Court of Appeals' analysis violates their due process rights?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Harkins Amusement Enterprises, Inc., and Daniel E. Harkins d/b/a Tower Plaza Cinema I and II (hereinafter "Harkins" or "Respondents") respectfully request that the Court deny the petition for writ of certiorari upon review of the judgment by the United States Court of Appeals for the Ninth Circuit, as amended, filed July 19, 1988.

OPINION BELOW

The Court of Appeals' opinion is reported as *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477 (9th Cir. 1988); a copy is attached to the petition as Appendix A.

JURISDICTION

Respondents agree with petitioners' statement, invoking this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

Harkins, an independent motion picture exhibitor, operated five theatres in Phoenix, Arizona, during the 1970's. Harkins filed this action against nine national film distributors and seven national and regional exhibitor circuits alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). The district court granted summary judgment as to all such claims, and Harkins appealed. The Ninth Circuit Court of Appeals affirmed in part, but reversed and remanded three of the Section 1 conspiracy claims: market-splitting, bid rigging, and circuit-wide deals. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 491-92 (9th Cir. 1988).

The petition for writ of certiorari before this Court does not question the propriety of the Court of Appeals' determination that genuine issues of material fact were raised by Harkins' evidence on these three surviving claims. The petition challenges only a single, narrowly defined issue addressed by the Court of Appeals: whether upon this record the split claim, "if proven, is illegal *per se*." 850 F.2d at 486.

A "split" among exhibitors, as that term is used in this case and in other reported decisions, is a horizontal agreement among exhibitors "that divide a normally competitive market by allocating pictures to particular members and prohibiting bidding for licensing rights to the films assigned." 850 F.2d at 480-81. In this case, "Phoenix exhibitors met regularly in the mid-1970's and divided rights to films on a picture-by-picture basis. Harkins was not a split member." *Id.* at 481.

When distributors of motion pictures participate in the split, a question which the Ninth Circuit remanded for

trial in this case, the excluded exhibitor is denied access to the supply of films he requires in order to compete. The Phoenix split enjoyed undeniable success at Harkins' expense. Among the facts presented to the Court of Appeals:

> (1) Films were licensed to the split-designated exhibitor 85% of the time; [2]
>
> (2) Harkins was awarded licenses to only 17 of the 435 films (4%) that were allocated by the split, although it operated 22% of the theatres in the market;
>
> (3) Films were licensed to split members in ninety instances when Harkins had submitted the only written bid;
>
> (4) On eighty-nine occasions, the split member's winning bid was undated or dated after offers were formally due.

850 F.2d at 484. These facts, coupled with other direct and circumstantial evidence, led the Ninth Circuit to reverse summary judgment based on the "alleged horizontal combination by the exhibitors and the vertical agreement between split members and individual distributors." *Id.* at 485.

The reasons urged in support of the petition before this Court are largely, if not entirely, based on an inaccurate and misleading characterization of the proceedings below and the record upon which the Court of Appeals found that the existence and operation of the Phoenix split, if proved, should be judged as a *per se* violation of the anti-

[2] "In addition to the 85% correlation between split designees and the actual film licensees, Harkins has presented uncontroverted evidence that exhibitors would sometimes 'trade' rights to assigned films. The distributors actually licensed films to split members 97% of the time. This figure includes six occasions in which both Harkins and an exhibitor defendant were licensed the same films." 850 F.2d at 485 n.3.

trust laws. We present this counterstatement of the case to the Court to correct any such false impressions:

1. At the outset, petitioners characterize the enormous success of the Phoenix split as the result of "independent decisions" by the film distributors to license their motion pictures through "an orderly allocation of negotiation rights among exhibitors rather than by competitive bidding." (Petition at 2).

In truth, the vast majority of films awarded to the designated split participants were (at least in theory) licensed pursuant to competitive bidding and not negotiation.[3] Moreover, this case in no way presumes independent business decisions on the part of the distributors in a non-competitive market. *See* 850 F.2d at 485 (noting the distributors' "consistent pattern of awarding films to designated exhibitors in the midst of an admittedly anticompetitive market"). The distributors' collusion and participation in the Phoenix split is an issue of fact remanded for trial. *Id.* at 486.

2. In the same vein, petitioners attempt to characterize their horizontal allocation of film rights as a "non-exclusive, non-coercive arrangement," the product of "a consensual method of distribution" among themselves and the distributor defendants. (Petition at 2). Here and elsewhere throughout the petition the Phoenix split is characterized as a "distributor-participation split," and the petitioners' legal arguments are based on this premise. (See, *e.g.*, Petition at 2, 4 & 6-8).

For the same reasons just stated, these are disputed issues, not facts. The Court of Appeals has in part reversed and remanded this case for a jury's determination of the distributors' participation in the split.

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[3] Upon reversing summary judgment on the related claim of bid rigging, the Court of Appeals found that the evidence presented "raises at least a reasonable inference that Harkins was victimized by tainted bidding procedures." 850 F.2d at 488.

3. Nowhere are petitioners' attempts to create their own record more blatant than their assertions that (a) Harkins operated five theatres in the Phoenix area, "but not all were first-run theatres," and (b) "Harkins had been invited to join the split but decided not to participate." (Petition at 3). The Court of Appeals properly rejected such defense arguments as disputed issues which, like other issues remanded for trial, are not established as a matter of law. *See* 850 F.2d at 481, 484 & n.2. A jury will assess the credibility of these so-called facts.

4. Finally, petitioners claim there was no record upon which the Court of Appeals could assess the anticompetitive effect of the Phoenix split and that *per se* liability was "not at issue on appeal." (Petition at 2). Petitioners, however, have never denied or controverted Harkins' evidence, and the distributor defendants themselves "have repeatedly acknowledged the existence of the Phoenix exhibitor split." 850 F.2d at 481.

The *per se* standard of liability was briefed and argued in both the trial court and before the Ninth Circuit on appeal. *See* 850 F.2d at 485-86. Petitioners' motions for rehearing and suggestion of rehearing *en banc*, questioning whether the issue was properly before the Court of Appeals, were denied by the Court's order dated August 4, 1988. (Petition Appendix B).

The subject of *per se* liability was hardly an "extraneous suggestion" addressed by the Court of Appeals without discussion. (See Petition at 4). As will be more fully developed in the legal argument which follows, the application of a *per se* standard to a horizontal cartel of exhibitors who, through the alleged cooperation and participation of the film distributors, eliminated Harkins as a competitor is nothing "new" or novel. No extensive analysis is required to determine that the split, on its face, constitutes a naked restraint of trade with no conceivable redeeming virtue.

REASONS FOR DENYING THE WRIT

I

GIVEN THE PRESENT POSTURE OF THIS CASE, REVIEW OF THE *PER SE* ISSUE BASED ON THE EVIDENCE SUBMITTED TO DEFEAT SUMMARY JUDGMENT IS PREMATURE

Petitioners contend that the Court of Appeals *per se* analysis of the Phoenix split based on the evidence presented in the summary judgment proceedings was erroneous. (Petition at 5-9). That conclusion, however, assumes that Harkins will be able to establish the disputed issues of fact remanded for trial to a jury's satisfaction, including the contested facts pertaining to the distributor defendants' active participation in the split. The Court of Appeals merely found that, assuming such disputed fact issues are resolved in Harkins' favor, the split, "if proven, is illegal *per se*." 850 F.2d at 486. In other words, Harkins will still be put to his proof before the trier of fact.

For this reason alone, this Court's review of the *per se* issue is premature. The present state of the record is subject to final determination upon remand to the district court. Certiorari should not be granted except for "special and important reasons" of concern to all litigants, not merely to the litigants in a particular case. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Absent a compelling reason, this Court will not risk an "inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." 349 U.S. at 77.

II

THE COURT OF APPEALS DID NOT CREATE A "NEW CATEGORY" OF *PER SE* LIABILITY IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR WITH OTHER CIRCUIT COURTS

The Court of Appeals did not create a "new" *per se* rule. (Petition at 5-6). Exhibitor splits consistently have been viewed as *per se* violations of the law by virtually every court that has considered the issue. *United States v. Capitol Service, Inc.*, 756 F.2d 502, 506 (7th Cir.), *cert. denied*, 474 U.S. 945 (1985);[4] *United States v. Cooperative Theatres of Ohio*, 845 F.2d 1367, 1370-73 (6th Cir. 1988); *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp.*, 632 F.2d 1135, 1140 (4th Cir. 1980); *General Cinema Corp. v. Buena Vista Distributing Co.*, 532 F. Supp. 1244, 1279 (C.D.Cal. 1982); *United States v. Cinemette Corp. of America*, 687 F.Supp. 976, 979 (W.D.Pa. 1988) 1987-1 Trade Cases (CCH) ¶ 67,637, p. 60,825 (W.D. Wash. 1987); *Seven Gables Corp. v. Sterling Recreation Organization Co.*; *see also Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, 492 & n.5 (5th Cir. 1982) (applying a boycott analysis, although the *per se* issue was not raised by the parties); *Universal Amusements Co. v. General Cinema Corp.*, 635 F.Supp. 1505, 1522-23 (S.D.Tex. 1985) (recognizing and applying a *per se* analysis, although plaintiff's evidence failed to support the theory); *Cinema-Tex Enterprises, Inc. v. Santikos Theatres, Inc.*, 414 F. Supp.

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[4] The Seventh Circuit Court of Appeals in *United States v. Capitol Service* specifically rejected an attempt to construct a hypothetical "good split," an argument apparently advanced by petitioners in this case (Petition at 8). 756 F.2d at 505-06. The Sherman Act does not countenance supposed benefits to the split members which may result from eliminating competition *Id.* at 506 (citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978)). Contrary to the position taken, a horizontal cartel among exhibitors, regardless of whether the harm is directed to the film distributors or to an excluded exhibitor, is a *per se* unlawful division of the market. (*Cf.* Petition at 6n. 8).

640, 643-44 (W.D.Tex. 1975), *modified*, 535 F.2d 932 (5th Cir. 1976) (reversed trial court's finding of *per se* liability as "beyond the necessities of the case"); *contra*, *Greenbrier Cinemas, Inc. v. Attorney General*, 511 F.Supp. 1046, 1060 (W.D.Va. 1981).[5]

Thus, it simply is not true, as the petitioners assert, that a majority of federal courts have refused to judge exhibitor splits as *per se* illegal. (Petition at 6).

The cases petitioners rely on in support of their argument do *not* stand for the proposition that exhibitor splits generally may be judged by a rule of reason standard. (Petition at 6 & n.7). In *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 320 F.2d 285 (3rd Cir. 1963), *aff'd by an equally divided Court*, 378 U.S. 123 (1964), the Third Circuit was careful to point out that the legality of splits in general was not at issue. The *Viking* Court narrowly ruled, based on the limited evidence

[5] The Virginia district court's opinion in the *Greenbrier* case is the *only* reported decision in which, based on the facts peculiar to that case alone, an exhibitor split has been evaluated under the rule of reason as opposed to a *per se* standard of liability. Subsequent federal court decisions, however, have severely criticized the opinion. The parties in *Greenbrier* had stipulated that no evidence regarding the purpose or effect of splits would be considered. 511 F.Supp. at 1059. The Virginia court said: "Trial was thus limited to the issue of what the split agreement was, how it operated, and whether the agreement did constitute a *per se* violation of the Act *regardless of any effect it might or might not have had on competition or price*." 511 F.Supp. at 1048 (emphasis added). The California district court in *General Cinema Corp. v. Buena Vista Distributing Co.* later observed: "Even though the fact that splits suppress competition seems quite obvious, it would indeed be difficult for a court to characterize a practice as *per se* illegal for the first time without considering its 'effect . . . on competition.'" 532 F.Supp. at 1266. Other courts have found this and similar reasons to either distinguish or ignore the Virginia court's limited ruling. *See, e.g., United States v. Capitol Service, Inc.*, 756 F.2d at 505; *United States v. Cinemette Corp. of America*, 687 F.Supp. at 981. The Court of Appeals in this case noted that the *Greenbrier* decision was contrary to this weight of authority, and, like other courts, rejected the case as reliable precedent. 850 F.2d at 486.

before it, that a mere failure to include all exhibitors in a split will not render it illegal "in the absence of evidence that it was so employed as to unreasonably restrict the competitive market, or had this result. There is no evidence in this case that the split system, standing alone, had this effect, or was so intended." 320 F.2d at 293. [6]

The Ninth Circuit Court of Appeals in this case correctly dismissed such arguments, analyzing the issue as follows:

> Courts have not regarded all concerted refusals to deal as illegal *per se*, but "rather have applied the rule of reason where the economic impact of the challenged practice is not obvious." *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1480 (9th Cir. 1986); *see Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 877 (9th Cir. 1987). *Per se* treatment is appropriate, however, "where joint efforts by firms disadvantage competitors by inducing suppliers or customers to deny relationships the competitors need in order to compete." *Dimidowich*, 803 F.2d at 1480. *See Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472

[6] Unlike the facts presented to the Court of Appeals in this case, the *Viking* Court was not called upon to assess the obvious anticompetitive impact of a *successful* split. *Cf.* 320 F.2d at 294 ("There is ample evidence that on many occasions the distributors acted in a manner directly contrary to [the split's] terms."). In contrast, the Court below found that the Phoenix split achieved enormous success through specific allocations of the distributors' films to the designated split members. 850 F.2d at 484-85 & n.3. The few other cases cited by petitioners are equally inapplicable to the record in this case. *See Seago v. North Carolina Theatres, Inc.*, 42 F.R.D. 627, 638 (E.D.N.C.), *aff'd*, 388 F.2d 987 (4th Cir. 1967) (no ruling regarding *per se* liability; held only that insufficient evidence precluded finding of conspiracy to exclude plaintiff from the market); *Admiral Theatres Corp. v. Douglas Theatre Corp.*, 437 F.Supp. 1268, 1293 (D.Neb. 1977), *aff'd*, 585 F.2d 877 (8th Cir. 1978) (insufficient evidence of conspiracy or injury; Court of Appeals did *not* address the issue of *per se* liability); *Greenbrier Cinemas, Inc. v. Attorney General*, 511 F.Supp. 1046, 1060 (W.D.Va. 1981) (discussed in fn.5, *supra*).

> U.S. 284, 294, 105 S.Ct. 2613, 2619, 86 L.Ed.2d 202 (1985).
>
> We conclude that the split agreement alleged here falls within the latter category, and if proven, is illegal *per se*.

This analysis recognizes the Phoenix split for what it is — a naked, horizontal restraint of trade "so plainly anticompetitive that no elaborate study of the industry is needed to establish [its] illegality. ..." *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Northern Pacific R.R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

There is no conflict with this Court's prior decisions or among the Circuits here. The exhibitor split at issue in this case, based on the clear import of the evidence, is a traditional *per se* restraint:

> One of the classic examples of the *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. ... This Court has reiterated time and time again that "[h]orizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition."

United States v. Topco Associates, Inc., 405 U.S. 596, 608, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). Regardless of the semantic characterization, a horizontal allocation of any element of the market is a *per se* violation of the Sherman Act. *See Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. at 294 (*per se* analysis appropriate "where joint efforts by firms disadvantage competitors by inducing suppliers or customers to deny relationships the competitors need in order to compete"); *e.g., United States v. General Motors Corp.*, 384 U.S. 127, 145, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) ("Elimination, by collaborative action, of discounters from the market is a *per se* violation of the Act."); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212, 79 S.Ct.

705, 3 L.Ed.2d 741 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category."); *Associated Press v. United States*, 326 U.S. 1, 15, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) ("The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitors' opportunity to buy or sell the things in which the groups compete.").

The Phoenix split, formed by Harkins' competitors, is such a horizontal, naked restraint of trade; its purpose was to divide the market and, coupled with the distributors' cooperation and participation, to deny Harkins the trade relationships he needed in order to compete. Such a conspiracy, where firms at one level attack a competitor at the same level by concerted effort to deprive their competitor of trade with a common supplier, is sufficient to invoke even the most conservative view of the *per se* standard.

Every Circuit court which has addressed the issue, including the Court below, has found that, upon sufficient proof, a horizontal cartel of exhibitors when coupled with the cooperation and participation of distributors provides the excluded exhibitor with a cause of action. (See discussion at pp. 7-9, *supra*). The appropriate analysis applied by these courts is the same: the distinction here is that Harkins' evidence is sufficient to defeat summary judgment and, as the Court said, the Phoenix split as alleged

would be judged by a *per se* standard if proved. 850 F.2d at 486.[7]

Petitioners' assertion that the Phoenix split is "primarily a form of vertical restraint which neither restricts output nor restrains 'interbrand' competition" is absolute fantasy. The fact that distributors may have participated in the unlawful cartel does not magically transform the primarily horizontal agreement into a vertical restraint case. The antitrust laws provide for joint and several liability on the part of the distributors themselves who, if it is established they did actively participate in the split's allocations of films, have joined in the horizontal conspir-

[7] Petitioners are correct that courts have also found an excluded exhibitor lacks standing to challenge a split if one or more distributors do not cooperate or participate in the allocation of available pictures. (Petition at 3 n.4). As determined by the Court below, however, a genuine issue of material fact was presented by Harkins' evidence as to whether the distributors in this case did in fact participate in the Phoenix split, thus setting the framework upon which a jury may find all defendants liable as co-conspirators in a Section 1 horizontal conspiracy. Again, however, the fact of distributor participation here is not yet subject to such a final determination, and petitioners' request for review by this Court is premature for that reason.

acy among exhibitors.[8] A group boycott exists even if each distributor, without considering the others, agrees to the split. As stated by this Court in *Business Electronics*: "[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." 99 L.Ed.2d at 821 n.4 (citing R. Bork, *The Antitrust Paradox* 288 (1978)). This is *not* a "hybrid" case in which a supplier acts in a dual capacity as both wholesale and retailer of its own products. (*Cf.* Petition at 9 & n.12).

The rule of *per se* liability governing group boycotts which in purpose and effect disadvantage the group's competitors is a well established and long standing staple of antitrust jurisprudence. The Court of Appeals did not blindly apply that principle in this case, but rather merely acknowledged the obvious. As the Court found, if proved, the Phoenix split fits squarely within the traditional framework of a *per se* group boycott or concerted refusal to deal.

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[8] This Court's most recent pronouncement on the subject of purely vertical restraints in a dealer temination case reaffirmed the application of these principles. In *Business Electronics Corp. v. Sharp Electronics Corp.*, _____ U.S. _____, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988), the Court held that such purely vertical restraints, unrelated to a price agreement, should be judged under a rule of reason given the presumed procompetitive benefits which may arise in that context. In so ruling, however, the Court distinguished its prior cases involving horizontal combinations among competitors at the same market level. Cited and approved were the Court's decisions in *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) (horizontal combination among dealers), and *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) (horizontal combination at the manufacturer and wholesaler levels), among others. The rationale of each of these cases supports the Court of Appeals' decision below when applied to the horizontal cartel of Harkins' "retail" competitors who, arguably in concert with the "supplier" distributors, achieved the ultimate anticompetitive result — control of the free market forces which would otherwise allow Harkins to effectively compete.

III

AFTER THOROUGH BRIEFING AND ARGUMENTS TO BOTH THE DISTRICT COURT AND THE COURT OF APPEALS, PETITIONERS WERE NOT UNFAIRLY SURPRISED BY THE COURT'S RULING AND, AS SUCH, WERE NOT DEPRIVED OF DUE PROCESS OF LAW

The entire thrust of petitioners' alternative argument, claiming deprivation of their due process rights, is the inaccurate and misleading suggestion that the issue of *per se* liability was not properly raised in the Court below. (Petition at 9). To the contrary, the issue was extensively briefed by the parties in both the trial court and the

Court of Appeals with regard to Harkins' ability as a matter of law to state a Sherman Act Claim. [9]

Despite having briefed and argued the point throughout the proceedings below, petitioners nevertheless claim to have been surprised by the Ninth Circuit's decision that the Phoenix split, if proven, is illegal *per se*. The same nonsense was raised by petitioners' motion for rehearing and suggestion of rehearing *en banc* after the Court of Appeals' issued its original opinion on April 6, 1988. The Court, recognizing the lack of any substance to their claim of unfair surprise, denied the motion and suggestion on August 4, 1988. (Petition Appendix B). They now attempt to mislead this Court.

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[9] In the district court, see Distributors' Memorandum in Support of Motions for Summary Judgment (CR 165) at 24-28 ("Plaintiff's split claims are inconsistent with established rules of law on legal injury"); Plaintiffs' Amended Response to the Motions (CR 223) at 14-15 ("The boycott of non-split participants in Phoenix is a *per se* violation"); Distributors' Reply Brief (CR 238) at 20 (arguing that a split is a *per se* restraint of trade); Exhibitor's Motion for Summary Judgment (CR 262) at 3-5 (arguing lack of competitive injury to the plaintiff); Plaintiff's Response to exhibitors' motion (CR 295) at 2-3 ("Splits as horizontal market allocations are a *per se* violation of the antitrust laws"); and Exhibitors' Reply Memorandum (CR 301) at 7-9 (arguing against the split's anticompetitive effects).

In the Court of Appeals, *see* Appellant's Opening Brief in No. 86-2553 at 26-30 ("The anticompetitive effects of the Phoenix split"); Distributors' Response Brief at 19-20 & 26-27 (arguing that splits are *per se* illegal, but that Harkins suffered no injury); Appellants' Reply Brief at 17-18 & n.13 (counterargument of same); Appellants' Opening Brief in Nos. 86-15046/87-1740 (consolidated) at 18-20 ("Exhibitor splits are a *per se* antitrust violation"); Exhibitors' Response Brief at 6-10 (arguing against *per se* standard and, in the alternative, arguing that plaintiffs suffered no injury); Appellants' Reply Brief at 3-5 ("The Exhibitors' split and its impact on Harkins' ability to compete in the Phoenix market is the classic example of a *per se* Sherman Act violation"). The appeals from summary judgments granted to the exhibitor defendants were consolidated with the appeal from the distributors' judgments.

Petitioners rely on Rule 28(a)(2), Federal Rules of Appellate Procedure, which requires a concise statement of the issues presented for appellate review. (Petition at 10-11). Defendants' summary judgment motions attacked nearly every aspect of Harkins' case. The issues appealed, as petitioners acknowledge, was whether judgment had been properly granted as a matter of law. Whether the split may be considered a *per se* violation of Section 1 was relevant to determine the sufficiency of Harkins' case and is well within the scope of the issues as framed.

Briefs are read liberally to ascertain the issues raised on appeal. *See Federal Savings and Loan Ins. Corp. v. Haralson*, 813 F.2d 370, 373 n.3 (11th Cir. 1987); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981); *see also* Supreme Court Rule 15(a) ("The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein."). All that is required is fair notice of the issues so as not to unduly hamper another party's ability to respond. *Federal Savings and Loan Ins. Corp. v. Haralson*, 813 F.2d at 374 n.3; *see also Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981) (appellate court may consider an issue raised late in the proceedings "when the appellee has not been misled and the issue has been fully explored"); *Harris v. Atchison, T.& S.F.Ry. Co.*, 538 F.2d

682, 684 & n.1 (5th Cir. 1976) (to the same effect where issue first raised by appellee in its response brief). [10]

Petitioners have been deprived of no procedural right of due process, and the Court below did not commit any such error of constitutional proportion. This case does not present "special and important reasons" for granting certiorari beyond the petitioners' mere academic rumblings. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Certiorari should be denied as a matter of course.

CONCLUSION

Based on the foregoing, Respondents respectfully submit that the petition for writ of certiorari requested of this Court be denied in all respects. The Court of Appeals' application of a *per se* standard to the Phoenix split, based on the facts presented and the reasonable inferences to be drawn from those facts, is a traditional application of this Court's precedent condemning horizontal conspiracies to divide the market and exclude competition. There is no conflict with this Court's earlier decisions and there is no conflict among the Circuits as would justify granting review of the Ninth Circuit's opinion prior to a final determination of the facts at trial.

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[10] The cases petitioners rely on are far from applicable. In *United States v. White*, 454 F.2d 435 (7th Cir. 1971), *cert. denied*, 406 U.S. 962 (1972) (Petition at 10-11), the issue was neither raised nor decided in the original appeal and had never been briefed, but was argued orally for the first time at a rehearing *en banc*. The Seventh Circuit exercised its discretion to deem the issue waived at that point. 454 F.2d at 439. Similarly, in *Cannon v. Teamsters-Chauffeurs Union*, 657 F.2d 173 (7th Cir. 1981) (Petition at 11), the issue was not raised or argued in the appellate briefs, but was presented for the first time at oral argument before the Court of Appeals. Here, too, the Seventh Circuit exercised its discretion to thus deem the issue waived. 657 F.2d at 177078. *See also McGee v. Estelle*, 772 F.2d 1206, 1213 (5th Cir. 1984) (issue not properly raised in district court and not argued in briefs on appeal); *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 7 (D.C.Cir. 1982) (same re issue not advanced or argued on appeal).

Petitioners have attempted to mislead the Court in a variety of ways, not the least of which is their claim that the Court of Appeals' ruling in this matter upon argument submitted by all parties to the appeal deprived them of due process of law. Certiorari should be denied.

RESPECTFULLY SUBMITTED this 30th day of November, 1988.

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